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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 293

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION, A CORPORATION,

Petitioner,

vs.

UNITED CASUALTY COMPANY, A CORPORATION; CRAFTSMAN INSURANCE COMPANY, A CORPORATION, AND HAROLD P. LACROIX.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT AND BRIEF IN SUPPORT THEREOF.

PHILIP E. HORAN,
GEORGE J. CLEARY,
V. J. SKUTT,
Counsel for Petitioner.

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Respondents.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Mutual Benefit Health & Accident Association, a corporation, respectfully shows to this honorable Court:

Statement of the Matters Involved.

This action was originated by the filing of a petition for a declaratory judgment in the United States District Court for the District of Massachusetts at Boston. The plaintiff

(petitioner) is a resident of Nebraska. The defendants (respondents) are residents of the State of Massachusetts. The action was filed on October 30, 1941, under the Federal Declaratory Judgment Statute. (Section 274 (d), Title 28, United States Judicial Code.) Plaintiff prayed for a construction of a reinsurance contract and the solution of a dispute existing thereon between the plaintiff and defendants involving in excess of the jurisdictional sum of $3,000 (R. 11).

Defendant, United Casualty Company, engaged in the health and accident insurance business, entered into a reinsurance agreement with plaintiff, Mutual Benefit Health & Accident Association, also engaged in that business, the effective date of which was July 1, 1940. The subject matter of the agreement was the hospital expense policies of the United Casualty. A few days thereafter defendant, United Casualty, consummated an agreement with defendant, Craftsman Insurance Company, also engaged in the health and accident insurance business, in which agreement, United Casualty transferred to the Craftsman all of its assets and remaining business. Thereby Craftsman Insurance Company assumed all liabilities of United Casualty. The reinsurance treaty, which is the basis of plaintiff's petition for Declaratory Judgment, is found at pages 17, 18 and 19 of the Transcript of Record. The portions material to this petition are as follows:

> This Agreement is made and entered into by and between Mutual Benefit Health and Accident Association of Omaha, Nebraska, hereinafter called the "Association", and United Casualty Company, of Westfield, Massachusetts, hereinafter called the "Company".
>
> "The subject matter of this contract is the Hospital Expense Insurance business of the Company consist-

ing of Hospital Expense Indemnity policies and Surgical Operation or Physician Fee riders attached thereto issued by the Company and in force July 1, 1940.

"The Company has heretofore, among other things, been engaged in the Hospital Expense Insurance business and has outstanding a large number of Hospital Expense Indemnity policies some of which provide by rider benefits for physicians' and surgeons' fees, and this business is hereinafter referred to as 'Hospital Insurance'. * * *

"It is the desire and intention of the Company to pay to the Association cash to cover one hundred (100%) per cent gross unearned premium reserve on these policies in force July 1, 1940, *plus cash in an amount sufficient to constitute an adequate reserve to adjust and pay all claims under such policies incurred prior to July 1, 1940, and unpaid by the Company on that date.* * * *

"All such claims paid by the Association's auditor shall be paid by draft upon the Association. The amount of any claim paid by the Association's auditor, if the claim was incurred prior to July 1, 1940, shall be considered the amount of actual reserve on that claim as of July 1, 1940. In ascertaining whether claims were incurred prior to July 1, 1940, *each claim will be considered on its merits and will be taken to have been incurred prior to July 1, 1940, if the insured's accident occurred prior to that date or if his sickness first became apparent prior to that date. In the event of any disagreement between the Company and the Association's auditor with respect to the incurred date of any claim, the Insurance Department's Examiner shall resolve the doubt.* * * *" (R. 17 and 18.) (Italics ours.)

It is admitted that plaintiff paid all claims under said reinsured policies, including the claims on which the "incurred date" was prior to July 1, 1940. Although the unearned premiums paid to plaintiff by defendant, United

Casualty, covered the period subsequent to July 1, 1940, only, United Casualty and co-defendant Craftsman refused to reimburse the plaintiff, or to arrive at the actual reserve, for the amount actually paid by plaintiff for certain claims on which the incurred date was prior to July 1, 1940. The basis for this refusal is set out in the joint answer of defendants, United Casualty Company and Craftsman Insurance Company, as "all disputes between the plaintiff and United Casualty Company involving the construction of their contract have been previously resolved by the examiner from the Insurance Department of the Commonwealth of Massachusetts, who was specifically designated by the parties in the contract as the one to resolve the very dispute and controversy sought by the plaintiff to be submitted to the Court for decision in this proceeding" (R. 21).

After the defendants had filed their answer containing that allegation, the plaintiff filed a motion to join as defendant the "Examiner from the Insurance Department of the Commonwealth of Massachusetts" referred to in defendant's answer. The motion was granted (R. 29-30). Defendant Examiner LaCroix thereafter filed an answer in this case in which he alleged,

> "That in determining the amount of the claim reserve to be paid by the defendant United Casualty Company to the plaintiff, *the defendant LaCroix determined the incurred date in all so-called maternity cases as the date of hospitalization of the insured, that is, the date when said insured entered the hospital, and if such entry into a hospital was not on or prior to July 1, 1940, determined that the claim made for hospitalization should not be set up or allowed as a claim incurred prior to July 1, 1940, and has taken all maternity cases as a whole and has ruled and resolved that in all said maternity cases where the insured was not in the hospital on or prior to July 1, 1940, liability therefor was placed by said contract upon the petitioner herein*" (R. 32). (Italics ours.)

The case was never tried on its merits. The District Court dismissed plaintiff's petition on the ground that the plaintiff could not "by a suit for a Declaratory Judgment reopen the questions which it referred to a neutral for a binding decision, and which the neutral decided against the plaintiff" (R. 49). Since the answer of "the neutral" alleged that he had not followed the terms of submission of the agreement, i. e., "*each claim* will be considered on its merits and will be taken to have been incurred prior to July 1, 1940, if the insured's accident occurred prior to that date or if his sickness first became apparent prior to that date." (Italics ours.) (Reinsurance Agreement, 2nd paragraph, R. 19), but on the contrary that he had "*taken all maternity cases as a whole* and has ruled and resolved that in all said maternity cases where the insured was not in the hospital on or prior to July 1, 1940, liability therefor was placed by said contract on petitioner herein" (italics ours) (Paragraph numbered 4 of Answer of Examiner LaCroix, R. 32), the plaintiff continued to seek a review of the "neutral's" findings and appealed. The Circuit Court of Appeals for the First Circuit affirmed the ruling of the District Court as quoted (R. 49). From this holding of the First Circuit Court of Appeals, this Petition for Writ of Certiorari is brought.

Jurisdiction.

This Court has jurisdiction to review the judgment under provisions of Section 240 (a) of the United States Judicial Code as amended to become Section 347 (a), Title 28, U. S. Code.

Questions Presented.

1. Where a reinsurance agreement provides for the assumption of liability on the part of one party for claims,

the incurred date of which claims precedes the effective date of the agreement, and where the agreement further provides for an "adequate reserve" when the full liabilities become known, is a provision in said agreement appointing a "neutral" to resolve disputed claims in accordance with a formula laid down in the reinsurance agreement a bar to a petition for declaratory judgment to resolve a dispute created by the failure of a neutral to act pursuant to said formula, and to establish said "adequate reserve"?

2. Under the provisions of the Federal Declaratory Judgment Act, can a trial judge, having taken jurisdiction, refuse to review the action of the parties and the "neutral" which produced the controversy upon the ground that the appointment of said "neutral" to decide certain disputes in accordance with certain formula renders such a review improper where the answer of the "neutral" filed to the petition for Declaratory Judgment admits that he failed to follow the formula laid down in the agreement which created him?

3. Where the Supreme Court of the state where the contract was executed has repeatedly held that the appointment of an arbitrator, referee or "neutral" is not a bar to an appeal from his findings nor a judicial review thereof where said arbitrator, referee or "neutral" did not follow the formula or terms of submission in making his award (*Palmer* v. *Clark*, 106 Mass. 373; *Estes* v. *Mansfield*, 6 Allen 69; *Boston Water Power Co.* v. *Gray*, 6 Met. 131, 167) is such a rule of the State Court binding on a Federal Court called upon in a Federal Declaratory Judgment proceedings to construe said contract?

Reasons Relied On for the Allowance of the Writ.

1. The decision of the Court of Appeals is contrary to and in direct conflict with the law of the State of Massachusetts as determined by

Boston Water Power Co. v. *Gray*, 6 Met. 131;
Cavanaugh v. *Dooley*, 6 Allen 66;
Estes v. *Mansfield*, 6 Allen 69;
Rowe v. *Williams*, 97 Mass. 163;
Palmer v. *Clark*, 106 Mass. 373;
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Pearl v. *Harris*, 121 Mass. 390;
Emerson v. *Wadman*, 122 Mass. 384;
Vass v. *Wales*, 129 Mass. 38;
White v. *Middlesex R. R. Co.*, 135 Mass. 216;
Miles v. *Schmidt*, 168 Mass. 339;
Doherty v. *Phoenix Ins. Co.*, 224 Mass. 310;
Patton v. *Babson Statistical Corp.*, 259 Mass. 424;
Fitzgerald Co. v. *Southbridge Etc. Co.*, 304 Mass. 130;
Lakube v. *Cohen*, 304 Mass. 156;
B. Fernandez & Hnos, S En C., v. *Rickert Rice Mills, Inc.*, 119 Fed. (2d) 809 (First Circuit).

2. The decision of the Court of Appeals is in conflict with the Constitution of the United States, the prior decisions of the First Circuit Court of Appeals, and the following decisions of the Supreme Court.

Erie Railroad Co. v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188;
Ruhlin v. *New York Life Ins. Co.*, 304 U. S. 202, 58 S. Ct. Rep. 860, 82 L. Ed. 1290;
Rosenthal v. *New York Life Ins. Co.*, 304 U. S. 263, 58 S. Ct. 874, 82 L. Ed. 1330;
Gammino v. *Town of Dedham*, 164 Fed. 593 (First Circuit);

B. Fernandez & Hnos, S En C., v. *Rickert Rice Mills, Inc.*, 119 Fed. (2d) 809 (First Circuit).

3. The Court of Appeals erred in holding that where the District Court had taken jurisdiction in a Federal Declaratory Judgment proceedings, it could refuse to review a justiciable controversy where no action was pending in any other Court and where in similar actions this Court has held that the Federal Declaratory Judgment Act was applicable. The action of the District Court in dismissing the petition was an abuse of discretion.

Borchard on Declaratory Judgments, 2nd Ed., pp. 313-4;

Brillhart v. *Excess Ins. Co.*, 316 U. S. 491; 62 S. Ct. 1173; 86 L. Ed. 1620;

Employers Liability Assur. Corp. v. *Ryan*, 109 Fed. (2nd) 690; 311 U. S. 722, 85 L. Ed. 470, 60 S. Ct. 1107;

Maryland Casualty Co. v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 61 S. Ct. 510, 85 L. Ed. 826, 1 Fed. Rules Dec. 295.

Prayer for Writ.

Wherefore, your petitioner respectfully prays that a Writ of Certiorari be issued by this Honorable Court and that the judgment of the First Circuit Court of Appeals may be reversed.

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Counsel for Petitioner.